

**IN THE SUPREME COURT OF MISSISSIPPI  
NO. 2008-IA-00602-SCT**

**DR. HENDRICK KUIPER, AND  
RIVER REGION MEDICAL  
CORPORATION/MEDICAL FOUNDATION**

**APPELLANTS**

**VS.**

**JOSEPH TARNABINE AND  
MARGARET TINA BRANAN  
CO-EXECUTORS ON BEHALF OF THE ESTATE  
OF MARTHA JONES TARNABINE**

**APPELLEES**

**APPEAL FROM THE CIRCUIT COURT  
OF WARREN COUNTY, MISSISSIPPI**

**REPLY BRIEF  
OF APPELLANTS**

**R.E. PARKER, JR. (MSB#4011)  
CLIFFORD C. WHITNEY III (MSB#10273)  
VARNER PARKER & SESSUMS, P.A.  
POST OFFICE BOX 1237  
1110 JACKSON STREET  
VICKSBURG, MS 39181-1237  
TELEPHONE: 601/638-8741  
FACSIMILE: 601/638-8666**

**ATTORNEYS FOR APPELLANTS**

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### **REFERENCES**

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## INTRODUCTION

This appeal arises from the Plaintiffs' (also referred to as "the Tarnabines") complete failure to present a physician affidavit, as is required to prevent the entry of summary judgment in a medical malpractice case. Service of process on the hospital defendants, River Region Medical Corporation and River Region Medical Foundation, was also fatally flawed. In their Brief, the Tarnabines fail to address the merits of these glaring defects in their case, and instead they claim for the very first time in this case that notice of the summary judgment proceedings was defective and that *res judicata* bars a dismissal for lack of service. Neither of these arguments will survive scrutiny.

Fundamentally, the issues raised by Plaintiffs were never presented to the trial court and cannot be considered for the first time on appeal. With regard to the notice question, the Tarnabines contend that they did not get notice of the summary judgment hearing; yet, they attach a Notice of Hearing to their Brief showing that they did receive notice. As to service of process, the Plaintiffs contend that the hospital Defendants lost their right to object to service of process under the doctrines of the law of the case and *res judicata*, because an earlier order of the trial court allegedly held that service was proper. This contention overlooks the true contents of the circuit court's ruling in setting aside the default, which did not address the question of service on the hospital Defendants. In short, Plaintiffs' arguments in their Brief are frivolous.

In reality, the Tarnabines cannot evade their failure to submit the required expert affidavit to support their medical malpractice claim and their failure to serve the correct resident agents of the hospital Defendants. This Court should now reverse and render judgment for the Defendants/Appellants.

## ARGUMENT

**1. *Plaintiffs Had Notice and an Opportunity to Present an Expert Medical Affidavit, and They Are Subject to the Entry of Summary Judgment for Failing to Submit this Essential Document.***

The Tarnabines do not deny that they failed to submit a medical affidavit to support the elements of their claim, as is required in a medical malpractice case. Instead, they make an ill-conceived argument that the notice of the summary judgment hearing was defective. This contention is ill-conceived because the Notice of Hearing itself is attached to the Plaintiffs' Brief and reads as follows:

Please take notice that the Motion to Dismiss and *Motion for Summary Judgment* by River Region Medical Corporation and River Region Medical Foundation, through undersigned counsel, *will be brought on for hearing on the 10<sup>th</sup> day of January, 2008*, at 10:00 a.m. in the Circuit Court of Warren County located in Vicksburg, Mississippi before the Honorable Issadore Patrick. (Emphasis added.)

Plaintiffs do not deny that they received this notice or that the motion was brought on for hearing on January 10, 2008, as stated in the Notice. Instead, they complain that the notice was not filed with the Clerk. Yet, the docket entries (E.3) contain an entry for December 7, 2007, showing that the Notice of Hearing for the Motion for Summary Judgment was indeed filed with the Clerk. The Notice was not designated for inclusion in the record for this appeal, because the issue of the sufficiency of the notice of the hearing has never been raised before.

It is true that the Notice of Hearing inadvertently omitted a reference to the fact that the Motion for Summary Judgment was filed on behalf of Dr. Kuiper, in addition to the other Defendants. However, the Motion itself (E. 26) shows that it was being filed by all Defendants, by stating "COMES NOW, *Defendants, Hendrick Kuiper, M.D., River Region Medical Corporation and River Region Medical Foundation*, and move the Court for summary judgment. . . ."

(Emphasis added.) The Notice of Hearing for the motion was served on Plaintiffs and filed with the Clerk. Counsel for Defendants argued the Motion for Summary Judgment on behalf of all of the Defendants at the hearing on January 10, 2008, and Plaintiffs' counsel never objected or raised the supposed lack of notice. Transcript of Hearing of 1/10/08, pp. 4, 9-11, attached hereto as Appendix 1.

Notice means "the condition of being so notified, whether or not actual awareness exists." *Black's Law Dictionary* (8th ed. 2004). "A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording." *Id.* Under any of these textbook definitions of notice, the Tarnabines were on notice that the Motion for Summary Judgment filed against them would be heard on January 10, 2008. Plaintiffs failed to file any response to the motion in the four months between the motion and the hearing, let alone an expert affidavit to establish a breach of duty and causation for their medical malpractice claim. Instead, the Tarnabines appeared through counsel at the January 10 hearing, where the motion for summary judgment was argued without objection by Plaintiffs.

Thus, the Tarnabines cannot now claim lack of notice, and the Court should reject their contention. Because Plaintiffs have raised no grounds on the merits to deny summary judgment, the Court should now reverse and render judgment.

**2. *The Hospital Defendants Have Not Waived Their Service of Process Defense.***

Although the Court need not reach this issue if it determines that summary judgment should be granted, the Tarnabines contend that the hospital Defendants are barred by *res judicata* and/or the law of the case from contesting the validity of service of process. The gist of this argument is that,

in setting aside an earlier default judgment, the trial court ruled that service was valid and its ruling was subsequently affirmed by a *per curiam* opinion of this Court. The fundamental flaw in the argument is that the circuit court's order setting aside the default makes no ruling whatsoever about the validity of service on the hospital Defendants. Its only ruling on service of process was with regard to Dr. Kuiper, who did not join in the Motion to Dismiss now before this Court. The trial court's Order of June 20, 2005 is attached as Appendix 2.

*Res judicata* is a bar to relitigating issues decided by a final judgment. *Anderson v. LaVere*, 895 So.2d 828 (Miss. 2004). The order setting aside the default judgment in this case was an interlocutory order and not a final judgment, so *res judicata* does not apply. Moreover, for purposes of *res judicata* and the law of the case, the matter as to which a party seeks to invoke the bar must be identical to that involved in the prior ruling. *Stewart v. Guaranty Bank and Trust Co. of Belzoni*, 596 So.2d 870 (Miss. 1992); *City of Hernando v. North Mississippi Utility Co.*, 3 So.3d 775, 786 (Miss. App. 2008). The issue of the validity of service on River Region Medical Corporation and River Region Medical Foundation has never been decided in any prior ruling by the trial court, and these defendants were free, once the default was set aside, to file a Motion to Dismiss for lack of service. Therefore, at a minimum, the Court should reverse and render as to River Region Medical Corporation and River Region Medical Foundation, on grounds of improper service of process.

**3. *The Tarnabines Waived Their Contentions Regarding Notice and Res Judicata by Never Raising Them in the Proceedings Below.***

All of the issues raised by the Tarnabines in this appeal are entirely new. They were never raised or asserted at any time in any proceeding below, let alone at the hearing on the Motion for Summary Judgment and the Motion to Dismiss. It is a basic rule that issues not raised before the

circuit court are procedurally barred from review by the Supreme Court. *Alley v. Northern Ins. Co.*, 926 So.2d 906, 910 (Miss. 2006). Therefore, the so-called defenses to Defendants' Motions raised in the Appellees' Brief should not be considered.

### CONCLUSION

Plaintiffs have raised entirely new issues regarding notice and *res judicata*, which cannot be considered for the first time on this appeal. That procedural defect aside, the Tarnabines received ample notice of the summary judgment hearing, and their failure to file an expert medical affidavit requires the entry of summary judgment in favor of Defendants. Moreover, the hospital Defendants are entitled to have the case dismissed for improper service of process, that matter having never been reached by the circuit court in prior proceedings. Therefore, the Court should reverse the circuit court and render judgment in favor of Defendants/Appellants.

Respectfully submitted,

DR. HENDRICK KUIPER AND RIVER REGION  
MEDICAL CORPORATION/MEDICAL  
FOUNDATION

BY: 

R. E. PARKER, JR., MSB #4011

CLIFFORD C. WHITNEY III, MSB#10273

OF COUNSEL:

VARNER, PARKER & SESSUMS, P.A.  
1110 Jackson Street  
Post Office Box 1237  
Vicksburg, Mississippi 39181-1237  
Telephone: 601/638-8741



### **CERTIFICATE OF SERVICE**

I, Clifford C. Whitney III, one of the attorneys for Defendants, River Region Medical Corporation and River Region Medical Foundation, do hereby certify that I have this day mailed, postage prepaid, by United States Mail, via facsimile and/or hand-delivered a true and correct copy of the above and foregoing document to the following counsel of record and to the trial court:

Marcie Southerland, Esq.  
1120 Jackson Street  
Vicksburg MS 39183

The Hon. Isadore Patrick  
P.O. Box 351  
Vicksburg, MS 39181-0351

This the 1<sup>st</sup> day of July, 2009.



CLIFFORD C. WHITNEY III

IN THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI  
JOSEPH TARNABINE AND MARGARET TINA BRONAN  
CO-EXECUTORS ON BEHALF OF THE ESTATE OF  
MARTHA J. TARNABINE

COPY

VERSUS

CAUSE NO. 020229-CIP

DR. HENDRICK KUIPER, RIVER REGION  
MEDICAL CORPORATION MEDICAL FOUNDATION

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THE FOLLOWING PROCEEDINGS WERE HAD AND HEARD ON JANUARY 10,  
2008 IN THE WARREN COUNTY COURTHOUSE IN VICKSBURG, MS 39180.

\*\*\*\*\*

APPEARANCES:

JUDGE ISADORE W. PATRICK  
NINTH JUDICIAL CIRCUIT COURT  
P. O. BOX 351  
VICKSBURG, MS 39180

REPRESENTING THE DEFENDANT:

Gene Parker, Attorney At Law  
Cliff Whitney, Attorney At Law  
VARNER, PARKER, AND SESSUMS  
Vicksburg, MS 39180

REPRESENTING THE PLAINTIFFS:

Marcie Southerland, Esq.  
Attorney At Law  
Vicksburg, MS 39180

APPENDIX 1

ORIGINAL

FILED  
2009 FEB -2 AM 4:37  
CLIFF WHITNEY

1 BY THE COURT: We have this morning Cause  
2 No. 020229, Joseph Tarnabine, Et Al versus Dr.  
3 Hendrick Kuiper, Et Al.

4 Comes on today a Motion to Dismiss and a  
5 Motion for Summary Judgement as filed by the  
6 Defendant and also a Motion to Withdraw  
7 Admissions as filed by the Plaintiffs.

8 Representing the Defendant is Mr. Whitney  
9 and representing the Plaintiff is Ms.  
10 Southerland.

11 Mr. Whitney, I'll hear your motions first.

12 BY MR. WHITNEY: Thank you, Your Honor.  
13 And I do apologize. We had a conflict with  
14 another case with Judge Vollor and we didn't  
15 know that this was set.

16 Judge, we have two motions this morning,  
17 one being a Motion for Summary Judgement by all  
18 the Defendants and other one being a Motion to  
19 Dismiss by the hospital. And I'll take the  
20 Motion for Summary Judgement first if I might.

21 Your Honor, I would just to hand the Court  
22 some copies of cases just in case Your Honor  
23 would like to refer to them.

24 Judge, our Motion for Summary Judgment is  
25 really based on the lack of any expert  
26 testimony to substantiate the standard of care  
27 or the breach of standard of care in this case.

28 It's a medical malpractice case involving an  
29 alleged negligence in a surgical procedure.

1 dismissed against the hospital. And because  
2 of the Statute of Limitations has long run in  
3 this case we would request that, that dismissal  
4 be with prejudice.

5 Your Honor, that is our position as to  
6 those two motions. We thank the Court.

7 BY THE COURT: Ms. Southerland.

8 BY MS. SOUTHERLAND: Just very briefly,  
9 Your Honor. Very simply put, as the Court  
10 knows, this case has been on going since  
11 actually since December 31st of 2002. And  
12 while Counsel-opposite keeps saying that  
13 nothing was done for two and a half years, no  
14 answers were provided, the discovery was not  
15 completed, that the admissions were neither  
16 admitted or denied in two and a half years,  
17 actually this case was on appeal with the  
18 Supreme Court until some 6 and a half or some 7  
19 months ago. And that would be the basis for  
20 our Motion to Withdraw the Admissions so that  
21 this case can have a fresh start and the  
22 Plaintiffs respond accordingly and appropriate  
23 as is necessary under the rules.

24 Clearly, this Court, it is within the  
25 discretion of this Court, and it is stated in  
26 Gilchrist versus Gilchrist, 918 So. 2nd that  
27 this Court has the discretion to withdraw those  
28 admissions. And, in fact, the Defendant,  
29 under Rule 36b must show to the Court that he

1 would be prejudice, or the party admitting must  
2 show to the Court that he would be prejudice in  
3 some manner if this Court does, in fact,  
4 withdraw the admissions. And, but for that  
5 reason the Court clearly has discretion to  
6 withdraw the admission and to allow the  
7 Plaintiff to move forward. And we submit,  
8 Judge, that this would be in the interest of  
9 justice in this most unusual case. I don't  
10 feel that I need to go back and refresh the  
11 Court's memory as to the facts as why we are  
12 even here today and I'm not going to waste the  
13 Court's time.

14 In regards to the Motion to Dismiss, we  
15 submit that the Court's record is clear on that  
16 and that Parkview Hospital, River Region  
17 Hospital, and, of course, I won't get into Dr.  
18 Kuiper, were clearly on notice and clearly were  
19 served with process of this court to appear and  
20 defend this lawsuit. And here were are 5  
21 years later, 30 more days to allow the  
22 Plaintiff to move forward would not prejudice  
23 anyone in this case. And that's our motion.  
24 Thank you.

25 BY MR. WHITNEY: Judge, briefly, we filed a  
26 Notice of Admissions in this case and served it  
27 on Plaintiff's counsel on July 12, 2007 and  
28 that is in the Court's file.

29 In the Appellate decisions that I gave the

1 Court very clearly state and I read a passage  
2 from the Sawyer case but it says, if the - -  
3 basically, it says that if the rule pertaining  
4 to deemed admissions under the Rule of Civil  
5 Procedure is to have an force or effect at all  
6 then there has to be a good excuse for failing  
7 to answer. We've got, whatever you might say  
8 about the appeal it ended in June or early  
9 July, I guess it was, of 2007. No, it was in  
10 June, I'm sorry, in June of 2007. Six weeks  
11 go by and we file a Notice of Deemed Admissions  
12 and nothing is done for another 6 months.  
13 So, there is simply no excuse. That's that  
14 issue. Ms. Southerland doesn't even address  
15 the question of - - we file a Summary  
16 Judgement motion and she doesn't produce  
17 anything to rebut or to establish the burden of  
18 proof elements that she has in this case with  
19 expert affidavit. And the cases are very  
20 clear that absent that the Defendant is  
21 entitled to summary judgement.

22 Thank you.

23 BY THE COURT: Well, when did you file your  
24 answer?

25 BY MR. WHITNEY: Your Honor, I have to look  
26 here. We filed our answer in 2005 after the  
27 Court set aside the default judgment we filed  
28 our answer on July 8th, 2005. The same day we  
29 filed - -

IN THE CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

JOSPEH TARNABINE AND  
MARAGET TINA BRANAN  
CO-EXECUTIVES ON BEHALF OF THE ESTATE  
OF MARTHA JONES TARNABINE

PLAINTIFF

VS.

CAUSE NO. 02,0229-CI-P

DR. HENDRICK KUIPER,  
RIVER REGION MEDICAL  
CORPORATION/MEDICAL FOUNDATION  
AND JOHN DOES (1-5)

DEFENDANTS

**ORDER**

CAME ON BEFORE THE COURT the Motion to Set Aside Judgment as filed by the Defendant in the above styled cause. That subsequent to said hearing, the Plaintiff moved the Court for a stay of its decision until further discovery was had. That no additional evidence has been put before the Court. Therefore the Court having considered said motion and having heard all evidence offered on the issue, is of the following opinion.

That Rule 60(b) allows relief from a judgment or an order for mistakes, inadvertencies, newly discovered evidence, and fraud.

That there was testimony by the process server for the Warren County Sheriff's Department that she personally served Dr. Kuiper according to her records, but she had no independent memory of the service.

That there was testimony from Dr. Kuiper that he was not personally served with process.

That the records of the Warren County Sheriff's Department reflect that a return of service was logged on April 15, 2003.

That the return was not filed in the Circuit Court file of this cause until February 2, 2004.

That there was no evidence offered for the unusual delay between the service of the Complaint

**COPY**  
APPENDIX 2

2005 JUN 20 PM 4: 50

SHELLY ASHLEY-PALMERTREE  
CIRCUIT CLERK  
WARREN CO., MS

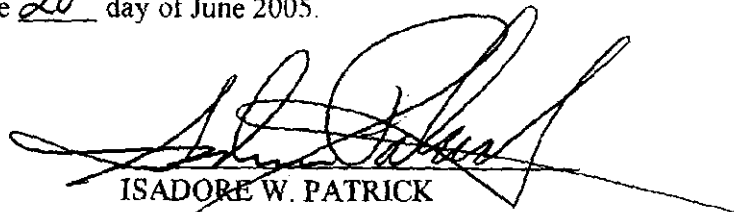
and the filing of the return with the Clerk.

That Mississippi Rules of Civil Procedure 60(b) requires the motion be filed within a reasonable time following judgment.

That this Court gives deference to the official records of the Warren County Sheriff's Department and the certification of service by the process server and finds that Dr. Kuiper was served with process.

However, the inadvertent delay between the service of process on April 15, 2003 and the filing of the return of service in the Circuit Clerk's Office, causes the Court some concern that the Defendant may have been prejudiced by the lengthy delay between the service of process and the filing of the return. Therefore the Court is of the opinion that the ends of justice would be served best by vacating said judgment and setting this cause on the docket to be tried on the merits. Therefore, the Default Judgment given in this case on February 3, 2004, is hereby vacated.

SO ORDERED AND ADJUDGED this the 20th day of June 2005.

  
ISADORE W. PATRICK  
CIRCUIT COURT JUDGE